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DECISION



M. Ector P. 2

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: R-189933

DATE: June 7, 1978

**MATTER OF: National Motors Corporation; Die Mesh
Corporation; Electric Fuel Propulsion
Corporation**

DIGEST:

1. Procuring agency need not conduct discussions, visit facilities, or inspect or test product of offeror properly determined to be outside competitive range.
2. Technical evaluations will be reviewed by GAO only to determine whether they are, as alleged by protesters, clearly without reasonable basis. Mere fact that offerors disagree with evaluations does not make them unreasonable.
3. Offeror who, by time initial proposals are due, has commenced business and demonstrated capability to produce, satisfies RFP requirement of being "currently engaged in the business of manufacturing," as defined during preproposal conference.
4. GAO is not proper forum for Freedom of Information Act requests or appeals. When information has not been provided to protesters or interested parties, either because of preaward posture of case or because procuring agency considers it exempt from disclosure under Act, but has been provided to GAO, it will be fully considered in reaching decision.
5. Agency may ignore competitive advantage which may have been gained by one offeror as result of its employees' work on prior contract, since Government awards contracts on basis of most advantageous offer and is not required to equalize competition by taking into consideration competitive advantages accruing to firms by reason of their own circumstances.

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Introduction

Three prospective contractors have protested to our Office concerning the former Energy Research and Development Administration's (ERDA) procurement of electric and hybrid vehicles under request for proposals (RFP) No. EY-77-R-08-0012. They are National Motors Corporation (National), Die Mesh Corporation (Die Mesh), and Electric Fuel Propulsion Corporation (EFPC). Two other protests concerning the same solicitation were filed but have now been withdrawn.

Each of the remaining protesters objects to the manner in which ERDA evaluated proposals and selected five firms with which to negotiate cost-type contracts for the design, fabrication, and delivery of two electric and/or hybrid vehicles. Protesters have alleged that ERDA followed improper evaluation procedures, made unreasonable or arbitrary and capricious technical evaluations, intended to make awards to firms which did not meet the requirements of the RFP, and favored particular offerors.

The Protested Solicitation

The RFP in question was issued May 20, 1977, by the Nevada Operations Office of ERDA, with an initial closing date of July 5, 1977, and an amended closing date of July 15, 1977. ERDA sought five firms capable of delivering two vehicles each within 8 months after award, with options for up to 50 additional vehicles in lots of 10. The estimated cost of each contract was to be \$100,000, with a total procurement cost of \$500,000, excluding options.

The RFP referred to Public Law 94-413, the Electric and Hybrid Vehicle Research, Development, and Demonstration Act of 1976 (the Act), codified at 15 U.S.C. 2501-2514 (1976 ed.). Under the Act, ERDA, now the Department of Energy (DOE), must buy or lease at least 2,500 electric or hybrid vehicles to be delivered by December 1979, and an additional 5,000 advanced vehicles for delivery by September 1982. These are to be used for demonstration purposes by Federal, State, and local governments, individuals, and businesses, including farms. See 15 U.S.C. 2506(c) and (d), supra. The RFP stated:

"While this procurement is not related to the purchase of the first 2,500 vehicles under the Act, it is necessary to stimulate the production of a series of 'product-improved' vehicles which incorporates improved, off-the-shelf technology. Early purchase of a few improved vehicles should provide a mechanism for existing small business concerns to upgrade their products and for potential suppliers to prepare for production. * * * In some cases, these vehicles will provide a bridge between the development of advanced vehicles and the production of improved state-of-the art vehicles. * * *"

The RFP stated that proposals would be considered only from firms; or their subsidiaries or affiliates:

"1. Which are currently engaged in the business of manufacturing electric and/or hybrid vehicles and which are capable of delivering two vehicles as specified within eight (8) months from date of award, and at least ten (10) additional vehicles at the option of the Government within the contract period.

"2. Which qualify as small business concerns under 13 C.F.R. 121.3-8."

The Selection Process

A preproposal conference, attended by 45 firms, was held in Las Vegas, Nevada, on June 2, 1977. All potential offerors were provided with a transcript of this conference. Thirty eight firms submitted proposals, with three firms submitting two each for a total of 41 proposals. Offerors were required to submit their proposals in four physically separated parts: Part I, Contract Proposal; Part II, Technical Proposal; Part III, Business Management Proposal and Part IV, Cost Proposal. Part I, Contract Proposal, was to contain a fully executed proposal form, offeror representations and certifications, certain additional information to be furnished by the offeror, and a summary of exceptions and deviations taken by the offeror. The provisions of Part I have not been an issue in these protests and it will not be considered further.

A Source Evaluation Panel composed of ERDA employees was divided into a Technical Committee and a Business Management/Cost Committee. The Technical Committee was to evaluate Part II of each offeror's submission, the technical proposal. Portions of each technical proposal (design and manufacturing plan, management and technical personnel, and corporate resources) were to be point-scored. However, other portions (experience and exceptions/deviations) were to be evaluated but not point-scored. (The relative value of these factors and the evaluation approach were explained in the RFP.)

The Business Management/Cost Committee was to evaluate those aspects of the proposals determined to be technically acceptable. Since all offerors found technically acceptable were also found acceptable by the Business Management Committee, that aspect of contractor selection also is not an issue in these protests. Thus, the focus of these protests is upon the propriety of the procedures for evaluating the offerors' technical proposals and the reasonableness of that evaluation.

After determining that all offerors satisfied the qualification criteria, the Panel sent the proposals to the Technical Committee for rating. According to DOE, after each Panel member had read each proposal, and had been advised of the Committee's ratings, the Panel and Committee agreed that 32 of the proposals were:

"(1) so technically deficient as to be unsatisfactory, or

"(2) did not represent a reasonable initial effort to address the initial requirements of the RFP, or

"(3) clearly demonstrated that the offerors did not understand the requirements of the RFP, or

"(4) contained design deficiencies which could not be corrected or improved without essentially requiring a new proposal."

These proposals therefore were evaluated only in narrative form by the Panel and the offerors were notified on August 3, 1977, that they would not be considered in ERDA's final evaluation.

Four of the nine remaining technically acceptable proposals had been received late, but the Panel found that they offered significant cost and technical advantages to the Government, so that they could be considered under the exception to the late proposals clause of the RFP. These were the proposals of Electric Vehicle Associates, Inc. (EVA), EVA/Chloride Electric Van, Inc. (EVA/Chloride), and two proposals of Batttronic Truck Corporation (Batttronic).

The Panel then completed its determination of the competitive range by point-scoring the nine proposals. In order of acceptability, these were the proposals of South Coast Technology, Inc. (South Coast) and Jet Industries, Inc. (Jet), both rated outstanding; Electric Vehicle Associates, Inc. (EVA) and EVA/Chloride, excellent; Batttronic (two proposals) and Minicars, Inc., good; and EFPC and Creative Automotive Research, satisfactory.

Site visits were made to each of these firms, and after discussions and a review of additional written materials submitted by offerors, the Panel recommended and the Source Selection Official concluded that contracts should be negotiated with the five most highly-rated firms. Negotiations with Batttronic were to be for pickup trucks only, because of limited funds and because two other offerors would be delivering vans. Final selection, the record indicates, was made on September 13, 1977.

Issue No. 1: Propriety of Proposal Evaluation Procedures

National, a manufacturer of hybrid vehicles, protested to our Office by letter of August 22, 1977. National initially argued that ERDA had violated procedures outlined in the agency's Interim Handbook on Source Evaluation and Selection, which states that a Source Evaluation Board may not merely accumulate committee scores and rank proposals accordingly; that simple technical nonresponsiveness is not alone sufficient to constitute unacceptability if a proposal is otherwise competitive; and that evaluation

may be discontinued only if a proposal does not represent a reasonable initial effort, has a substantial design deficiency, or contains major weaknesses or omissions. National specifically objected to ERDA's failure to ask questions, inspect its facilities, or test its prototype vehicle to "obtain sufficient clarifying information (apparently required) in order to make a fair evaluation of the NMC concept."

National also argued that it was not appropriate to evaluate its hybrid in terms of electric vehicle specifications, particularly when the Act required establishment of performance standards for hybrids, but that in any case, its vehicle greatly exceeded all specifications for driving range, top speed, and cruising speed. National presented a detailed chronology of its contacts with ERDA up to the time the solicitation was issued and contended that if ERDA had not considered its hybrid concept viable, the agency should not have encouraged National to submit a proposal.

DOE responded that the February 1977 edition of its Source Evaluation Board Handbook, in effect at the time of this procurement (rather than an earlier edition cited by National) did not apply because this procurement involved less than \$5 million. Nevertheless, ERDA had elected to use the handbook as a guide, and DOE argued that all procedures outlined therein were followed. Discussions with National before the RFP was issued, DOE stated, were at that firm's request and were not intended to determine whether the newly-formed company was capable of improving its vehicle or offering an alternative through a formal proposal. The solicitation offered National an opportunity for a more extensive evaluation of its vehicle than informal discussions, and the agency would have been criticized for not soliciting National's proposal, DOE concluded.

DOE stated that proposals had been reviewed twice by each member of the Technical Committee, and although National's proposal made a favorable initial impression, on second reading it was found unsatisfactory. A majority of the Panel met with the Committee and reviewed recommendations regarding all 41 proposals before selecting those in the competitive range, DOE advised; thus, proposals were not eliminated merely by accumulating Committee scores or because they were determined to be technically nonresponsive, as National alleged.

DOE also argued that it had no obligation to inspect, observe, or test vehicles before determining which proposals were outside of the competitive range. Site visits were made, DOE stated, only after the Panel had identified the proposals which it believed might become eligible for award, and discussions were held only with these offerors. DOE concluded that such visits and discussions were fully in accord with applicable procurement regulations.

As for evaluating National's proposal for a hybrid vehicle in terms of electric vehicle specifications, DOE stated that the Act, supra, did not require development of hybrid vehicle performance standards until December 1977, well after the date of this procurement. (Proposed standards actually were published in 43 Fed. Reg. 5841, February 10, 1978.) Moreover, DOE argued, a protest regarding failure to include hybrid vehicle specifications in the RFP was untimely under our Office's Bid Protest Procedures, which require that alleged deficiencies which are apparent from the face of a solicitation be protested before the closing date for receipt of initial proposals.

GAO Analysis of Evaluation Procedures

The first issue for our consideration is the propriety of ERDA's evaluation procedures. DOE, with considerable specificity, has documented the process by which proposals were initially reviewed by the Source Evaluation Panel, referred to the Technical Committee for independent rating, then reconsidered by the Panel, and finally selected by the Source Selection Official. The mere accumulation of committee scores is prohibited by the current edition of the Source Evaluation Board Handbook, as well as the earlier one relied on by National; however, during the process outlined, we do not believe that this occurred.

Elimination of proposals before initial ratings is permitted by the Handbook for reasons such as those listed by DOE. We believe that ERDA's evaluation--including site visits only to those offerors in the competitive range--was consistent with the procedures outlined in the Handbook, as well as with the requirements of the Federal Procurement Regulations (FPR) §§ 1-3.804 and 1-3.805.1 (1964 ed.). The latter requires that discussions be conducted with responsible offerors submitting proposals in the competitive range, price

and other factors considered. A proposal is not in the competitive range if it is so technically inferior that meaningful negotiations are precluded, or where there is no real possibility that it could be improved to a point where it could become acceptable. See 3BD Computer Services Corporation, B-186950, December 21, 1976, 76-2 CPD 511.

We note that Die Mesh, as well as National, objected to ERDA's failure to visit its plant and inspect and/or test its vehicle as part of the evaluation process. These objections, we believe, reflect a fundamental misunderstanding of negotiated procurement procedures, in which the burden is on an offeror to affirmatively demonstrate the merits of its proposal. See Julie Research Laboratories, Inc., 55 Comp. Gen. 374 (1975), 75-2 CPD 232. If National and Die Mesh's proposals were properly determined to be "unsatisfactory," ERDA was not required to conduct discussions with them. See also Energy Research Corporation, B-185018, July 13, 1976, 76-2 CPD 37.

As for National's contention that the RFP was defective because it lacked separate specifications or evaluation criteria for hybrid vehicles, we agree that the argument is untimely and therefore will not consider it on the merits. 4 C.F.R. 20.2(b)(1) (1977 ed.).

Issue No. 2: Technical Evaluation

The RFP clearly states that of the three major aspects of the proposals which would be evaluated--technical, cost, and business management--the technical aspect would have the greatest relative importance. Technical evaluation criteria were further subdivided and were listed in the RFP as follows in order of decreasing importance:

1. Design and Manufacturing Plan
2. Management and Technical Personnel
3. Corporate Resources
4. Experience

Factors 1 through 3 were point-scored; factor 4 was not.

Offerors were advised that:

"The proposal should clearly and fully demonstrate the offeror's capability,

knowledge and experience in regard to the technical requirements described herein. Stating that the offeror understands and will comply with the technical requirements is not adequate. Similarly, phrases such as 'Standard procedures will be employed' or 'Well known techniques will be used' are also inadequate. Failure to respond or follow the instructions regarding the organization and content of the proposal may result in the offeror's proposal being deemed unacceptable."

The first section of the technical proposal, "Design and Manufacturing Plan," had a total percentage point value which was more than "Management and Technical Personnel" and "Corporate Resources" combined. As for the content of the "Design and Manufacturing Plan," offerors were instructed by the RFP:

"Under this section, the offeror's proposal is to deal with three main factors, which are:

1. Comprehensive Discussion
2. Overall Plan
3. Technical Planning

"1. Comprehensive Discussion

A comprehensive discussion of the design and manufacturing requirements must be provided in sufficient and precise details to permit a recognition that the offeror understands the scope of the project. The offeror must relate his organizational capabilities and experience to the objectives of this project.

"2. Overall Plan

The offeror is to provide a plan whereby it will be evaluated to determine the understanding of the basic technology (Attachment D, Appendix A, paragraph 1), the method of planning to accomplish the

work, and steps to be taken to assure completion of the effort.

"3. Technical Planning

Within this section, the offeror is to describe the capability to solve the problems and meet the objectives as stated in the Statement of Work. There should be a comparison of the performance offered with the desired specifications. Explain how the adequacy of the data submitted will substantiate the performance offered." (Emphasis added.)

Included within the Statement of Work were two and one-half pages of target specifications for the vehicles, including such subjects as passenger and cargo capacity, range, speed, acceleration, time required for and energy consumed by recharging the vehicle's batteries, battery cycle life, battery compartment design requirements, protection for the traction motor, controller and power conditioner, safety design requirements, handling, drive-line, and defroster/heater. The RFP advised offerors that multiple awards would be made "based on a comparison of [offerors'] proposed specifications to those listed below and on the evaluation criteria * * *."

Therefore, if any element of an offeror's proposal can be singled out as particularly important, it is the "design and manufacturing plan," in which the offeror is to describe how he intends to go about providing a vehicle which will meet the objectives of the Statement of Work, and to substantiate the performance of the vehicle he offers. After reading the proposals of the successful firms and the protesters, as well as the comments of DOE's evaluators, we believe it is fair to say that the rejection of the protesters' proposals was in good measure attributable to deficiencies in this area.

A. National Motors

National's unsatisfactory rating, DOE stated, was due to the extreme weight of the vehicle, which was regarded as posing inherent safety problems, and to the large number of changes proposed for the power train, which would have resulted in the vehicle being essentially a new

prototype. In addition, DOE stated that National planned to use experimental lead acid batteries, rather than off-the-shelf technology. DOE concluded that neither performance, reliability, nor compliance with safety standards was adequately substantiated in National's proposal.

In its comments on the DOE report and during a February 15, 1978 conference at our Office, National quoted extensively from a letter by the chairman of the Source Evaluation Panel, taking issue with specific findings as to its technical proposal. National stated that it had offered standard electric batteries, with the possibility of experimental batteries if they were a proven item at the time of delivery. DOE had noted that National offered an unspecified overrunning clutch between the V-6 engine and the electric motor; National argued that the manufacturer had been specified in the proposal and the clutch operation described. As for vehicle weight, National disputed DOE's estimate that 1,800 pounds would be added during conversion, arguing that this was almost 30 percent higher than actual weight added. Substantiation of performance was not based on theoretical calculations, National argued, since its vehicle operated daily in the proposed configuration and all components were constructed and functioning. The firm concluded that improvements, rather than a totally new design, were what DOE had sought and what National had offered.

National also quoted extensively from a transcript of its debriefing in an attempt to show that numerous other aspects of its proposal had not been correctly evaluated by DOE. National argued that if any of the weaknesses listed for its proposal were common to the successful proposals, then its proposal had been arbitrarily and capriciously evaluated.

DOE responded that none of the successful proposals had the same weaknesses as National's proposal. DOE stated that in its technical proposal, National had failed to indicate the make, model, horsepower rating, or any other quantitative characteristic of the clutch; the manufacturer had been referred to only in National's business management proposal, which had not been seen by the Technical Committee. Thus, DOE concluded its evaluators

reasonably found that National had not provided the necessary information. Regarding vehicle weight, the Panel used figures supplied by a commercial dealer for the weight of the basic vehicle which National planned to convert. Since National's proposed vehicle was listed as 5,400 pounds, the Panel determined that National would be adding 1,798 pounds to the basic vehicle's 3,602 pounds. This determination, DOE stated, led the Panel to question National's assertion that the hybrid modification would not affect any of the basic vehicle's safety features.

B. EFPC

EFPC, by letter of September 26, 1977, protested that the alleged deficiencies cited by ERDA with regard to its vehicle were "superficial and without foundation." EFPC took exception to ERDA's findings that the firm had limited manpower resources; that the Volvo 343 it proposed to convert was not readily available because it was not sold commercially in the United States; and that it had not discussed vehicle chassis safety in its proposal. EFPC also charged that ERDA had not given sufficient credit for its experience and capability, as demonstrated in electric car tours and races, or for its unique lead-based battery which could be recharged to 80 percent of capacity in 45 minutes.

EFPC's proposal, as noted above, was among those in the competitive range but was not among the five finally selected for award. In addition to the deficiencies which EFPC had been informed of by correspondence and during a debriefing, in its report on the protest DOE listed failure to discuss proposed improvements or to substantiate performance claims, particularly with regard to regenerative braking, infinitely variable transmission, and suspension modification; sacrifice of vehicle range for high speed capability; extreme weight of the proposed batteries and motor; and exceptions taken by EFPC to the charging time and energy use per kilometer specified in the RFP. DOE stated that EFPC's management strength and experience in developing and building electric vehicles had been taken into account, but the listed deficiencies caused its proposal to be ranked below others in the competitive range.

Counsel for EFPC has designated those portions of the firm's comments on the DOE report which deal with its technical proposal as proprietary. We therefore merely note that the firm found none of DOE's criticisms supportable, and argued that either the proposal itself or discussions during and after the site visit adequately addressed all of the areas cited by DOE as unsubstantiated.

Following the conference at our Office, EFPC further argued that ERDA's evaluation was arbitrary and capricious due to failure to weigh experience, particularly in view of the alleged relative inexperience of South Coast and Jet; failure to seek additional clarification of alleged areas of uncertainty in EFPC's proposal; failure to grasp the technological aspects of EFPC's proposal; and failure to downgrade Jet for use of a foreign chassis, since ERDA had downgraded EFPC for proposing the Volvo 343.

DOE, in its rebuttal, insisted that its original appraisal of EFPC's proposal was reasonable. With regard to adequate manpower, DOE stated that resumes for key personnel did not indicate that those individuals were currently employed by EFPC or had worked together on vehicles previously built by that firm. "This tended to negate the value of EFPC's corporate experience," DOE stated. DOE argued that specific objections to experience not having been point-scored were untimely. And although the proposal stated that emphasis would be given to operating performance, economy, and safety of the vehicle propulsion system, as opposed to chassis design, DOE found that EFPC had not addressed vehicle chassis safety. Jet was not downgraded, DOE stated, because although it proposed using a foreign chassis, it had enough in stock to perform the contract, including options. EFPC, on the other hand, had neither stock nor a firm agreement to obtain the Volvo chassis.

As for the scope of discussions with EFPC, DOE argued that its purpose was to assure that the Panel understood the proposal as originally submitted. DOE states that it sought to avoid giving any proposer an opportunity to amend its proposal or to submit a new proposal.

C. Die Mesh

Deficiencies in Die Mesh's technical proposal which were listed by DOE included failure to provide a technical management plan; misunderstanding of portions of the RFP, for example, "over current limit control;" failure to substantiate performance and/or safety claims; and failure to fully describe either Die Mesh's present or proposed vehicle.

While not specifically challenging the technical evaluation of its proposal, Die Mesh argued that it was qualified for award because it had logged over 45,000 on-the-road miles in its electric vehicles; had been in business for 10 years; had a 77,000 square foot building devoted to electric vehicle production; was the only manufacturer using a patented three motor-three battery pack system; and held patents for component parts such as a variable speed transmission, a permanent magnet modularized motor, and an improved design for rapid charge and discharge of batteries.

Die Mesh sought cancellation of the solicitation; both National and EFPC requested reevaluation of their technical proposals, preferably by an independent organization outside of DOE. The agency contended, however, that there was no basis for such reevaluation, because the protesters had not shown that initial evaluations were arbitrary or capricious, unreasonable, or in violation of procurement statutes and regulations.

GAO Analysis of Technical Evaluations

It is clear from the protesters' assertions and DOE's responses that the parties substantially disagree as to the validity of ERDA's evaluations of their technical proposals. Our Office, however, has never taken the position that we will substitute our judgment for the agency's--by conducting technical evaluations of proposals and rendering determinations as to their acceptability--simply because a protest has been filed, Julie Research Laboratories, Inc., supra, or because bias on the part of the agency has been alleged. Joanell Laboratories, Incorporated, B-187547, January 25, 1977, 77-1 CPD 51.

On the contrary, we have repeatedly emphasized that decisions as to the relative merits of proposals are the primary responsibility of the contracting agency, whose officials enjoy a reasonable range of discretion in the evaluation of proposals and in the determination of which offeror or proposal is to be accepted for award. These determinations must not be disturbed unless shown to be arbitrary or in violation of procurement statutes and regulations. This is particularly the case where, as here, the procurement involves determinations which must be based on expert technical opinion. Id.; Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404, and cases cited therein.

In this light, the question is not whether protesters' proposals were technically acceptable, but whether ERDA's actions in evaluating them and determining that National and Die Mesh's proposals were "unsatisfactory," and that EFPC's proposal, although "good," did not justify negotiation of a contract, were clearly without a reasonable basis. See Julie Research Laboratories, Inc., supra. Although we are not in a position to resolve the disagreement with respect to each stated deficiency, it does appear that many of the disputed points are of such a nature that the proposals could reasonably have been evaluated as they were. See Joanell Laboratories, Incorporated, supra.

For example, with regard to whether off-the-shelf or experimental batteries were proposed by National, that firm's proposal included a table showing characteristics of four different types of batteries. It indicated that sufficient life-cycle test data was not available for experimental type No. 1, "However include in test material that if these batteries exceed 400 deep cycle discharges they will be provided in the first two and subsequent vehicles." (Emphasis added.) Later in its proposal, National spoke of affording ERDA the opportunity to "take advantage of this improved battery while simultaneously testing it in the NMC hybrid vehicle." Evaluators' assumptions that National might provide experimental batteries, performance of which was not substantiated in the proposal, could reasonably have been based on these statements.

Although the RFP stated that the technical proposals should be fully self-contained, National provided no

details concerning the manufacturer or capacity of its overrunning clutch in the technical proposal itself. National's failure to specify the actual amount of weight being added to its vehicle or to discuss safety problems associated with this addition also combined to provide a reasonable basis for elimination of its proposal from the competitive range, particularly in view of the emphasis on operational safety in the Statement of Work in the RFP and in the introductory remarks at the preproposal conference.

The primary issue with regard to evaluation of EFPC's proposal, we believe, involves the scope of ERDA's discussions with the offeror. We have held that in a negotiated procurement, discussions must be "meaningful," and that the Government must usually furnish information to offerors as to the areas in which their proposals are deficient. However, the content and extent of those discussions also is primarily a matter for determination by the contracting agency, whose judgment will not be disturbed unless clearly without a reasonable basis. Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458 at 36.

With regard to manpower, for example, in EFPC's proposal, the organization chart showed six key individuals who would be responsible for performance of any resulting contract, and it was stated that all were currently employed by EFPC. The attached resumes, however, showed only two of those individuals in such a capacity. Two others were listed as being associated with a proposed subcontractor, while the status of the remaining individuals, a consultant and a designer, was unclear. While we believe ERDA could have clarified this without "technical transfusion" or other adverse effect on the competitive system, Dynallectron Corporation, 55 Comp. Gen. 859 (1976), 76-1 CPD 167, we find that ERDA did give EFPC an opportunity to correct what it regarded as material deficiencies in its proposal. DOE has submitted a memorandum showing that specific questions were addressed to EFPC on August 25, 1977, on the firm's proposed transmission and on regenerative braking. ERDA also informed EFPC that substantiation of offered performance was considered very general in nature, and asked whether the firm would like to submit more specific information. EFPC merely referred ERDA to test reports and patents which had been submitted as companion volumes to the

original proposal. DOE states that in its judgment, any additional questions would have indicated to EFPC ways to amend its proposal.

We have reviewed the proposals of the offerors selected for negotiation of contracts, as well as those of the protesters, and have read the reports of the Technical Committee, Source Evaluation Panel, and Source Selection Official. On this record, we cannot conclude that the technical evaluators acted arbitrarily or unreasonably in selecting eight firms for site visits and discussions and in eliminating the remaining firms from the competitive range. Final selection of the five whose proposals were most highly rated appears to have been based on the reasoned judgment of Panel members and to have been in accord with the evaluation criteria listed in the RFP. The fact that protesters disagree with evaluations of their proposals does not mean that these evaluations were unreasonable. Houston Films, Inc.--Reconsideration, B-184402, June 16, 1976, 76-1 CPD 380.

Issue No. 3: Qualifications of Successful Offerors

A. South Coast

Each of the protesters has contended that one or more firms selected for negotiation of contracts under this solicitation did not meet the requirements of the RFP. A common allegation is that South Coast was not "currently engaged in the business of manufacturing" electric vehicles.

Die Mesh alleged that South Coast had not even been in existence at the time the RFP was issued, and argued that the fact that South Coast was not incorporated until July 6, 1977, alone was enough to disqualify the firm. Die Mesh argued that South Coast did not have an existing vehicle and/or one which could be improved (also alleged by National), occupied only 700 square feet of working space, and could not submit a three-year financial statement as required by the RFP.

EFPC argued that in the 9 days between its incorporation and the July 15, 1977 extended closing date, South Coast "could not conceivably have built an electric car

on which to base an improvement." In addition to the qualification criteria specifically listed in the RFP, EFPC argued that the solicitation and preproposal conference imposed other requirements, including production of at least one electric vehicle during 1976, which neither South Coast nor EVA/Chloride could meet. EFPC based this argument on a preproposal conference exchange in which offerors were told that a firm which had built and tested an electric vehicle during 1976 would qualify for award if, during a site visit, it was determined that the firm possessed the necessary manpower and facilities even though it had stopped production due to lack of money.

EFPC also quoted ERDA statements distinguishing between a prototype, defined as a totally new product, and a product improvement, arguing that South Coast could have only a prototype. Although the incorporators of South Coast might have been experienced, EFPC alleged that the corporation itself had never made an electric vehicle, had only \$4,200 at the time of incorporation, and would rely almost entirely on subcontractors in building its vehicle. EFPC argued that an award to South Coast would constitute "unfair discrimination" against companies which had proven products, years of experience, many patents, and millions of dollars invested.

Responding to these allegations, DOE consistently maintained that South Coast was properly selected for contract negotiation. DOE argued that the RFP did not require corporate existence, but rather "manufacturing capability." In any case, DOE stated, South Coast was operating as a de facto corporation before July 6, 1977. DOE also argued that the solicitation did not require a three-year financial statement.

DOE argued that its construction of "currently engaged in the business of manufacturing" had been amply explained during the preproposal conference, but that even if the criterion was ambiguous, in order to preclude award to South Coast, protesters would have to show that they had been individually prejudiced by the ambiguity or that competition was unduly restricted by the criterion. In this case, DOE argued, protesters were not prejudiced, since all offerors had been accepted as meeting the criterion, all proposals were

technically evaluated, and there was no change in ranking because of the criterion. The agency stated that acceptance of South Coast and rejection of protesters' proposals was due instead to their relative strengths and weaknesses. According to the Source Selection Official, the South Coast proposal was selected because it:

"* * * showed a complete understanding of the requirements of the RFP and presented a fully developed plan complete with preliminary designs, fabrication techniques, assembly and test procedures, and proposed maintenance and service followup for delivery of an initial two product-improved vehicles. The plan was supported by a strong team of committed subcontractors and component suppliers. The plan included an excellent discussion of design problems and proposed alternate solutions to these problems. There was substantiating data evidencing that the shunt motor-powered vehicle would greatly exceed the RFP specifications."

DOE stated that strong experience on the part of its principals also was considered to be a South Coast strength. Thus, according to the agency, protesters had not demonstrated that they were prejudiced, since elimination of South Coast would not have resulted in selection of their own proposals. As for unduly restricting competition, DOE concluded that there was no evidence that any potential offeror had been discouraged from submitting a proposal by the qualification criterion, as EFPC alleged.

B. EVA/Chloride

Protesters also objected to the selection of EVA/Chloride for negotiation of a contract. First, they argued that ERDA had expressed an intention to make awards to five separate firms but had not done so, since EVA and EVA/Chloride, which listed the same business address, were for all "intents and purposes" the same firm. Protesters also argued that the firm did not qualify for award because Chloride, Limited, a major British battery manufacturer, was not a small business. National Motors, in addition, alleged violation of the

Buy American Act, while Die Mesh argued that the solicitation had prohibited proposals from joint ventures.

DOE responded that these and other objections to EVA/Chloride were moot, since the firm had withdrawn its proposal from consideration for award on October 31, 1977. Addressing the substance of the protests, however, DOE stated that EVA and EVA/Chloride were two distinct legal entities; EVA/Chloride is a Delaware corporation, jointly owned by EVA, an Ohio corporation, and Chloride, Incorporated, a Delaware corporation. Moreover, DOE stated, the solicitation did not prohibit selection of more than one proposal from the same offeror; although ERDA officials at the preproposal conference admittedly had indicated they intended to select five separate offerors, it was clear that the Source Selection Official could choose two proposals from the same offeror if this was more advantageous to the Government.

With regard to EVA/Chloride's status as a small business, DOE argued that absent a challenge to its self-certification, ERDA had no reason to doubt the firm's size. After EFPC protested to our Office, the question was referred to the Small Business Administration (SBA). Because EVA/Chloride did not provide SBA with requested information, it was determined to be other than a small business. Thus, DOE argued, absent the challenge to EVA/Chloride's size status, award could properly have been made to that firm.

As for the Buy American Act, DOE stated that EVA/Chloride was a domestic offeror by virtue of its Delaware incorporation, even though it was affiliated with a British corporation. Moreover, DOE stated, the Act applies only to use of domestic source end products in procurement of supplies for public use, and does not pertain to foreign ownership of the offeror of such supplies.

Preproposal conference statements regarding joint ventures were interpreted by DOE as indicating that they were qualified if one of the members was "currently engaged in the business of manufacturing" electric vehicles and capable of delivering within the stated time. In addition, DOE asserted that EVA/Chloride was not a joint venture, but had submitted a proposal as a single legal entity.

C. Late Proposals

Protesters complained that EVA and EVA/Chloride, as well as Battronic, submitted late proposals. DOE pointed out that the RFP permitted consideration of such proposals if they had been received before the competitive range was determined and if they offered significant cost or technical advantages to the Government. The challenged proposals were received well before determination of the competitive range, DOE stated--EVA and EVA/Chloride's on the closing date, Friday, July 15, 1977, although after the 4:30 p.m. deadline, and Battronic's on Monday, July 18, 1977. Advantages were listed as follows:

"EVA - the only American-made chassis converted to electric drive and proven through testing; an energy efficient lo-slip torque converter-transmission which provided at least a 5 percent improvement in energy efficiency.

" EVA/Chloride - a spiral bevel differential which provided at least a 5 percent improvement in energy efficiency; a proven tubular battery technology providing extended battery cycle life.

" Battronic Truck Corporation - the only electric pickup offered as requested by the RFP; a realistic low cost to the Government."

Thus, DOE concluded, ERDA properly considered late proposals for contract negotiations.

GAO Analysis of Qualifications of Offerors

In discussing the qualifications of offerors, we will not consider protesters' allegations concerning EVA/Chloride. No useful purpose would be served, since that firm has withdrawn its proposal from consideration for award, and we agree with DOE that these protests are now moot. See West Electronics, Inc., B-190173, February 10, 1978, 78-1 CPD 118.

Nor will we discuss acceptance of late proposals, since the RFP, in accord with Federal Procurement

Regulations (FPR) § 1-3.802-2 (1964 ed.), permits consideration of such proposals under circumstances which we believe DOE has demonstrated existed.

We find no merit to Die Mesh's argument that South Coast should be disqualified because that firm could not provide an audited financial statement for the last three fiscal years, which the RFP instructed offerors to include in their business management proposals. We note that at the preproposal conference, in response to one firm's comment that the requirement for a three-year statement "represents quite a burden," ERDA's Senior Accountant, who was a member of the Source Evaluation Panel, replied:

"The purpose of those financial statements is for us to determine that you are financially responsible to perform the contract work and they are only required if you already have them. We are not asking you to go out and get an outside auditing firm and have your financial statements audited. Any information you can give us will help us to determine if you're financially responsible. That's all that's required." (Emphasis added.)

The remaining issue regarding qualification of offerors has been framed by protesters and DOE as whether South Coast was "currently engaged in the business of manufacturing" electric vehicles. The solicitation did not define the term "currently engaged in the business of manufacturing," and judging from the number of questions raised by potential offerors at the preproposal conference, the provision was the source of some confusion. Although in retrospect it appears that this portion of the RFP should have been more clearly expressed, we believe DOE's interpretation of it was made reasonably clear at the conference. Shown below is the discussion of this requirement as it appears in the transcript of questions and answers which was distributed by ERDA to all prospective offerors before proposals were received:

"COPPER DEVELOPMENT ASSOCIATION, INC.

"QUESTION: Will a company qualify under the qualification criteria page 4 item 1 of the RFP cover letter if they commit significant resources to the manufacture of electric vehicles by July 5, 1977 but were not engaged in the manufacture of electric vehicles on May 20, 1977, the date of the cover letter? It is recognized that such a company must meet all other qualification criteria also.

"ANSWER: No, because such a proposer would not be engaged in the manufacture of vehicles at the time that the proposals are required to be submitted.

*[Subsequent to the conference the due date for initial proposals was extended to July 15, 1977.]

* * * * *

"MR. ARONSON: I'm Bob Aronson of Electric Fuel Propulsion.

* * * * *

"Now, I have a couple of specific questions; first, about the size of the car. This morning, I think someone mentioned a 3,000 pound car as an example. In the RFP, I believe mention was made of a small car. Are you contemplating really a small, two or three or four-passenger car or does this RFP cover a larger car, such as a six-passenger car?

"CHAIRMAN SMITS [ERDA]: Walt?

"MR. DIPPOLD [ERDA]: The car, the minimum specification is two-passenger. That's basically to give a floor for people who--and again, the RFP is for improved product development, so we are looking for people that are already in the business to improve their product, primarily. That doesn't exclude other people from bidding, but that's the basic thrust of the RFP.

So, the two-passenger minimum on the car is exactly that, a minimum. It is open on the passenger car as to what size you offer. (Emphasis added.)

* * * * *

"MR. CHILDS: I'm Bob Childs from Energy Research and Development Corporation, and earlier you stated, I think, the question--and I have a couple of them. One was that if somebody started in business in May, you would not consider them a vehicle manufacturer?

"CHAIRMAN SMITS: No, that's not correct. The way the question was sent to us was that substantial corporation assets were being devoted to the electric vehicle area. He didn't indicate in his question that he would be a manufacturer of vehicles on the 5th of July.

"MR. CHILDS: Now, you said he wouldn't.

"CHAIRMAN SMITS: Well, he didn't tell us he would. He said, 'substantial corporate investments.'

"MR. CHILDS: Okay, let's back up, then. Let's define a vehicle manufacturer from a small business standpoint. Is a man to put out one vehicle, ten vehicles, fifty vehicles?

"CHAIRMAN SMITS: Dick, will you get the qualification criteria and speak to that.

"MR. AMICK [ERDA]: The qualification criteria in the RFP, which is on page 4, states 'engaged in the business of manufacturing,' and it doesn't specify any number of vehicles.

"MR. CHILDS: So, it doesn't matter, as long as the corporation is engaged in the manufacturing--

"MR. AMICK: If he has commenced business and you have a plan--

"MR. CHILDS: All right, okay. The next question I have is that from all I've listened to today in the RFP what you want is over-sized, overweight, commercially available vehicles converted with batteries, as they are presently being done. You don't want any new technology as far as the vehicle goes itself.

"CHAIRMAN SMITS: Is that a question?

"MR. CHILDS: Yes.

"MR. DIPPOLD: I think that's not properly interpreting the RFP. What we're saying is that this RFP is intended for product improvements in areas that existing products might be weak. We didn't say you couldn't start with a white sheet of paper. You would probably be at a disadvantage playing catch-up, but it certainly is open. If the vehicle is going to come out as an improvement over what's available and handles all of the specs, that is something I think you should submit. But your statement of over-sized, overweight, etc., does not apply. I don't think that is necessary. (Emphasis added.)

* * * * *

"MR. WOUK: Let me introduce myself first. I'm Victor Wouk and my particular affiliation, I'm Victor Wouk, a private consultant and/or President of a dormant company. Whether I am President of PETRO-ELECTRIC MOTORS depends upon some of the answers I get.

"We now come to page 4, item 1 again, and I apologize for asking, 'Proposals will be considered only from firms which are currently engaged in the business of manufacturing electric and/or hybrid vehicles.'

Now , as Petro-Electric, we stopped building vehicles. The vehicle was built, tested by EPA, met all specifications, was tested by ERDA, showed all sorts of promise, but we stopped because no funds were available. Are we still currently engaged in the business of manufacturing electric and/or hybrid vehicles? The company exists; it hasn't done anything in a year.

"CHAIRMAN SMITS: Let me put it this way. In the evaluation of the proposals, in the competitive range the finalists, if you will, there will be visits to facilities, to plants or whatever they are; and if those facilities exist and if in your proposal you indicate that you have or will have the manpower and you have the facilities, you have a manufacturing capability. This does not, the criteria does not say you must be producing cars, it says you must be in the business of manufacturing. (Emphasis added.)

"MR. WOUK: Then that I think answers my question.

"CHAIRMAN SMITS: Is that right, Daryl?

"MR. MORSE [ERDA]: If he manufactured them last year, yes, he would be qualified.

* * * * *

"MR. KAYLOE: Al Kayloe from ELECTRIC VEHICLE ASSOCIATES.

"Does the type of work that we are licensed to perform by the state under which we are incorporated have anything to do with this RFP, because we all, as businessmen, have a vendors license and a number in a state which says whether we are a research corporation or a manufacturing corporation, whether we sell things.

"It seems to me that the definition of manufacturer that we are bandying about

very loosely has a base in law called a vendors license which says whether or not we are a manufacturer. If we are not licensed in our state to be a manufacturer, I think that that would be a consideration in the selection and evaluation as to whether or not we are indeed in the business of manufacturing. It's a question with a rhetorical answer.

"MR. AMICK: I think that would be a factor that we would take into consideration in determining whether or not your company meets the qualification criteria.

"CHAIRMAN SMITS: Yes, sir?

"MR. HUNTER: I'm Mr. Hunter, an independent consultant.

"Do you make a distinction between manufacturing in terms of putting out some given number of vehicles, custom shop work, where you could be putting out a very few or indeed a very small shop whose work is entirely building and developing a prototype but has not actually built some given quantity of vehicles and sold them to some outside customers?

"MR. AMICK: I think that we've addressed this once before. To me, that criteria has nothing at all to do with numbers.

"MR. HUNTER: I wanted to make sure I understood that. You're saying that if somebody has a facility and they've been working on vehicles, you consider them a manufacturer?

"MR. AMICK: It has to do with capability of producing a vehicle, whether it's one or five or one in the process ongoing. (Emphasis added.)

* * * * *

"MR. HARRHAY [EVA/Chloride]: The other question is we are beating a dead horse with the definition of being engaged in the business of manufacturing, but my question is specific. Would a

corporation be considered responsive in regards to being engaged in the business of manufacturing clause in the qualification criteria if it had purchased the design rights, tooling and so forth, for an existing electric vehicle which meets the Statement of Work Description and had been in the process of production planning and product update prior to the issuance of the RFP but actually not having delivered vehicles for sale, but this production program and so forth had planned for and would allow for two vehicle delivery within the time frame and also the production delivery of a fifty vehicle option.

"If they had not actually delivered or made the vehicles but purchased an existing line from another company, would they be considered responsive?

"MR. AMICK: Yes, I think they would be. We've been talking in terms of existing capability, and from what you described in your hypothetical situation that particular company would then have the capability of manufacturing the vehicles that we are looking for here.

* * * * *

"IIT RESEARCH INSTITUTE

"QUESTION: Does manufacture and/or sale of an electric conversion kit for a conventional existing I.C. powered automobile qualify a firm under paragraph 1 of the qualification criteria?

"ANSWER: The criteria requires that the firm must be 'engaged in the business of manufacturing' vehicles; therefore, it does not appear that only the manufacture or sale of an electric conversion kit would qualify.

"QUESTION: Does manufacture and/or sale of a converted electric vehicle, from an existing I.C. powered automobile, qualify a firm under paragraph 1 of the qualification criteria?

"ANSWER: Yes.

"QUESTION: Does manufacture and/or sale of an electric vehicle strictly for off-road recreational vehicle use qualify a firm under paragraph 1 of the qualification criteria?

"ANSWER: Yes.

* * * * *

"QUESTION: The RFP provides two contradictory statements regarding the qualifications for acceptable bidders. Page 4 of 5 on qualification criteria states firms are to be considered only if they are to be 'currently engaged in the business of manufacturing electric and/or hybrid vehicles.' Page 2 of the Statement of Work states that this procurement is for 'existing small business concerns to upgrade their products and for potential suppliers to prepare for production.' Specifically would a company which is currently engaged in the production of limited run specialty automotive vehicles but not utilizing electric or hybrid power plants be considered as qualified?

"ANSWER: If the proposed small business contractor is engaged in the business of manufacturing electric and/or hybrid vehicles by July 15, 1977 and is capable of delivering two vehicles as to the RFP requirements within eight (8) months from date of award, and at least ten (10) additional vehicles at the option of the Government within the contract period, then he is qualified."

The answers given by ERDA to the offerors indicate a liberal interpretation of the term "engaged in the business of manufacturing:" an interpretation which was more likely to include firms than to exclude them. Offerors were told that although the primary thrust of the RFP was to permit those already in the business to improve their products, "other people" were not precluded from competing. In order to qualify, it was not necessary for an offeror to have produced any certain,

number of vehicles; he need only have commenced business and demonstrated, at the time initial proposals were due, the capability to produce the vehicles. Therefore, we do not agree with EFPC's contention that a firm must have built at least one car in 1976 in order to qualify.

South Coast's president states that the three principals of that firm began acting as a partnership on June 8, 1977, and, under California law, became a de facto corporation on June 17, 1977, with the submission of articles of incorporation to the Secretary of State. Those articles were endorsed and filed on July 6, 1977, the date referred to by protesters.

At the time of submission of initial proposals, South Coast had commenced business and in ERDA's judgment had demonstrated in its proposal the capability to produce the vehicle. We believe that South Coast therefore satisfied the "currently engaged in the business of manufacturing" criterion.

Issue 4: Allegations of Favoritism

The major remaining category of protests in this case involves allegations of favoritism toward particular offerors. Die Mesh initially protested that the identity of two successful offerors, South Coast and Jet, had been disclosed to it by a source which had "no right" to this information, two weeks before selections were officially announced. Die Mesh later alleged that the source was a private consultant who had prepared Jet's proposal. Die Mesh regarded this disclosure as evidence of preselection of the two firms.

In addition, Die Mesh alleged that ERDA had previously purchased electric vehicles on a sole source basis from Jet and EVA; that ERDA officials had visited successful offerors but had not visited Die Mesh; that the National Aeronautics and Space Administration (NASA), on behalf of ERDA, had tested Jet and EVA's vehicles, but not Die Mesh's; and that ERDA had endorsed Jet's vehicle in a letter which Jet had used for promotional purposes and by allowing Jet to display its van with an ERDA seal at an industry exposition in April 1977.

EFPC and Die Mesh--neither of whom has seen South Coast's proposal due to the fact that award has not yet been made, and because it contains proprietary data--both speculated that South Coast's proposal might have been based on an electric vehicle design study published in August 1977 under an ERDA contract with ASL Engineering, Inc. (ASL). The protesters alleged that three South Coast incorporators were employees of ASL until June 1977, and that South Coast's president attended the preproposal conference in that capacity. The protesters also alleged that these individuals gained undue advantage over other offerors through contacts with ERDA officials during performance of the ASL contract.

On the question of improper disclosure, DOE denied that there were such disclosures and argued that even if information as to South Coast and Jet's rankings had been revealed to Die Mesh's source, Die Mesh was not prejudiced, since its proposal had properly been determined to be outside the competitive range.

From the beginning of the selection process, DOE stated, precautionary measures were taken by the chairman of the Source Selection Panel to prevent any proposal from receiving preference over another due to personal interests of any individual involved in the selection process. All members of the Panel and Technical Committee were requested to sign certificates of No Conflict of Interest and Non-Disclosure of Information, and to read regulations governing conduct of ERDA employees, particularly those relating to personal financial interests and misuse of information.

Before DOE learned of Die Mesh's source of information, the agency argued that identification of two successful offerors would have been pure speculation, probably based on the source's knowledge of openly-conducted site visits. After learning the name of the source, DOE obtained an affidavit from that individual which stated that he had been contacted by counsel for Die Mesh; that he did not tell Die Mesh that South Coast would be a winner (and in fact did not even know that South Coast existed at the time in question); and that his statement that Jet would be a winner was based on "pure speculation."

Protests regarding sole source awards to Jet and EVA, DOE stated, were untimely, but in any case these

purchases were properly made, having occurred in August 1975 and September 1976. Neither the Selection Official nor the majority of the Panel had been involved in the earlier purchases, DOE stated, and other firms whose vehicles had been tested by NASA or purchased by ERDA also were "not selected" for present negotiations. DOE stated that NASA had also considered testing Die Mesh's vehicle, but limited funds permitted actual testing of only 10 vehicles believed to be representative of overall production and experimental state-of-the-art.

The letter allegedly used by Jet for promotional purposes was written by the chairman of the Technical Committee, DOE stated; it was an accurate summary of a NASA test report, and ERDA had no prior knowledge of or control over its use. Display of a Jet vehicle with an ERDA seal occurred after Jet had requested permission to drive the van from Texas to an exposition in Chicago; permission to display it was neither sought nor obtained, DOE stated. However, DOE argued, it has been ERDA policy since 1975 to make the electric vehicle program visible to the public, and vehicles have been displayed at various Government and commercial expositions, with manufacturers invited to attend, service, and describe their vehicles. DOE argued that Jet's display of its van was consistent with this policy.

Before the RFP in question was issued, DOE acknowledged, members of the Panel and Committee had visited companies involved in this competition, and the Committee chairman had become personally acquainted with one or more of their senior officials. However, it stated, this was only because this individual's official Government duties required "continuous interaction with this developing industry." DOE asserted that the visits were not related to the procurement in question, and there was no evidence that they in any way resulted in prejudice for or against any particular offeror.

With regard to previous contracts performed by South Coast principals for ERDA, DOE argued that they had neither access to privileged information nor an unfair competitive advantage. DOE discussed the ASL design study contract, EY 76-C-03-1295, as follows:

"Substantively, the technical matters covered by the design study had no

relevance or relationship to the technical requirements of the subject RFP. The purpose of the design study was to offer conceptual designs for advanced state-of-the-art electric vehicles. The designs, through the assistance of computer models, were to be representative of 1979 technology with a capability for mass production by 1981. In a very real sense the study entailed 'paper cars.' In contrast, the present procurement only required product-improved vehicles based on off-the-shelf 1977 technology capable of being produced within eight months of contract award. None of the three vehicles conceptualized by ASL in the design study have any resemblance to the SCT vehicle. Thus, we submit the design study could not have been of substantive technical assistance to SCT in the preparation of its proposal."

Moreover, DOE stated, the report on the design study was submitted to ERDA in draft form in January 1977 and in final form the following month, after which it was available to the public on request. A summary also was distributed following presentation at a symposium for all ERDA contractors in Washington, D.C. during April 1977.

Commenting on the same allegations, South Coast, in a letter to our Office dated November 7, 1977, stated that its proposal "bears no resemblance to work done or the vehicle proposed in the earlier ERDA contract."

South Coast listed differences between its proposed vehicle and the one offered for the design study, which had the following characteristics: Audi 100 and Volkswagen 411 chassis components; a four-passenger vehicle with central battery tunnel; and three alternative propulsion systems, including (1) a series motor, chopper controller, with 3-speed automatic transmission, (2) a shunt motor, field control, with continuously variable transmission, and (3) a shunt motor, flywheel, field and armature control with continuously variable transmission.

GAO Analysis

We do not find that protesters have proved that any

offeror was improperly preselected for award. Counsel for Die Mesh has not directly accused any member of the Panel or the Technical Committee of improperly disclosing names of highest ranked offerors. Investigation by a GAO audit team, as part of a Congressionally requested review of the electric and hybrid vehicle program, disclosed that all but two Panel and Committee members signed certificates of No Conflict of Interest and Non-Disclosure of Information. Those who did not were legal advisers to the Panel, who have submitted affidavits stating that they had no part in ranking the proposals received under the RFP, and did not discuss evaluations with anyone except ERDA/DOE personnel in connection with their legal duties. These and the affidavit of the private consultant from whom Die Mesh allegedly obtained names of successful offerors are, we believe, sufficient to establish that no improper disclosure occurred, absent specific evidence to the contrary.

Protests regarding sole-source purchases and testing of other manufacturers' electric vehicles are either untimely or not for consideration under our Bid Protest Procedures, which are reserved for consideration of the legality of a particular award, and which must be timely filed. See 4 C.F.R. 20 (1977 ed.).

Jet Industries, our audit revealed, requested a letter from ERDA for use in obtaining financing; no other such letters were requested or sent. The propriety of this letter, which could be construed as evidence of favoritism, is primarily a matter for the Department of Energy. Development Associates, Inc., B-187756, May 5, 1977, 77-1 CPD 310. We do not believe it has been established that the letter had an impact on this procurement or that the official who signed the letter was actually predisposed toward Jet or unduly influenced the selections of the Panel.

Nor do we believe the mere fact that some evaluators visited firms involved in this competition on earlier occasions establishes favoritism. Our audit shows that ERDA officials in the transportation energy conservation field are required to keep abreast of recent developments in the electric vehicle industry, and it would not be unusual for them to have visited various manufacturers.

As to the above allegations, we do not find that protesters have established bias or shown that the relative ranking of offerors was affected by disclosure or any of the other alleged conflicts of interest. See Development Associates, Inc., supra.

After examining South Coast's technical proposal, however, we do see similarities between information contained in the electric vehicle design study prepared by ASL Engineering, Inc. under ERDA contract EY 76-C-03-1295 and that included in South Coast's proposal.

In its proposal, we find that South Coast lists the ASL design study as Reference No. 1 and acknowledges that its proposed product-improved electric vehicle is based in part upon the experience of the firm's personnel in making that study. For example, South Coast states that the chopper controller used for armature current control is a problem component in many existing electric vehicles; in its proposed vehicle, speed and torque control will be obtained by a combination of motor field control together with transmission control. "This is essentially the approach recommended by ASL Engineering, Inc. in Reference 1 * * *," the proposal states. In discussing its proposed propulsion system, South Coast again states that armature current will be controlled indirectly through field and transmission control. "This scheme is similar to that described in Reference 1, with modifications to permit the use of production hardware."

South Coast notes that at the time of preparation of its proposal, the selection of rear hubs and brakes was not final and indicates that Audi 100 LS rear hubs and brakes were being considered for use, with Volkswagen 411-12 components (proposed in the ASL study) as an alternative if a hub with heavier duty bearings was found desirable.

The heater-defroster selected for the ASL design study vehicle was an Eberspacher B1L gasoline heater, rated at 5,000 BTU; South Coast states that its product-improved vehicle will incorporate a gasoline fired heater defroster system, and suggests two commercially available units, one of them being the Eberspacher B2N, rated at 8,000 BTU.

In its proposal, South Coast also discusses the problem of protection from high voltage during service or charging operations, and duplicates virtually word-for-word a section on operator safety found in the ASL study. A full page of diagrams of simplified charger circuits in the design study is identical to a page in the South Coast proposal, except the ASL study shows 96 volts while South Coast's proposal shows 108 volts. Another diagram, showing a proposed ground fault interrupter, also is identical except for voltage. These diagrams are not attributed to the ASL study.

The issue here is not whether South Coast's incorporators made use of the information and experience gained during performance of the ASL contract in preparing their proposal for a product-improved vehicle--it is clear that they did. What we must determine is whether this was improper or illegal. For the following reasons, we conclude that it was not.

We have consistently stated that the Government is not required to equalize competition on a particular procurement by considering the competitive advantages accruing to firms because of incumbency or their own particular circumstances, including the award of other contracts. ENSEC Service Corp., 55 Comp. Gen. 656 (1976), 76-1 CPD 34; Houston Films, Inc., supra. Although a competitive advantage may exist, the test of the propriety or legality of an award is whether that advantage was the result of preference or unfair action by the Government. Price Waterhouse & Co., B-186779, November 15, 1976, 76-2 CPD 412.

In some cases, we have found that the Government did contribute to a bidder or offeror's competitive advantage. See, for example, The Franklin Institute, 55 Comp. Gen. 280 (1975), 75-2 CPD 194, in which a Government official brought an incumbent contractor's employee into a meeting with a competitor and discussed technical approaches and costs which would have given the incumbent a competitive advantage, without identifying the individuals concerned. See also 49 Comp. Gen. 251 (1969), in which a Government employee disclosed an incumbent's performance and cost data to another bidder, prejudicing the contractor's position in bidding on a new contract. In both cases, we found the resulting atmosphere of suspicion and mistrust

sufficient to reduce confidence in the competitive system, and recommended resoliciting. We stated that if information such as performance and cost data could properly be disclosed, and would have been essential to or helpful in preparing an intelligent bid, it should have been made available to all bidders. 49 Comp. Gen., supra, at 253.

On the other hand, we have found that when an awardee gained knowledge in performing one Government program, namely a Saturn launch support contract with the NASA which aided it in preparing a proposal for NASA's space shuttle main engine, the awardee had not gained a substantial or unfair competitive advantage. The rationale for that decision was that although work on the first contract was germane to the second in a general sense, only three tasks were directly relevant, and only two of these had any influence on the Source Selection Board. The protester also had alleged that the awardee's prior performance had influenced the Board and provided a line of communication with evaluators which other competitors lacked. We found that although the information resulting from the work was not disseminated, the benefits of such dissemination were doubtful and the protester, aware that the work was ongoing, could have made further inquiry as to the results. B-173677, March 31, 1972, summarized at 51 Comp. Gen. 621 (1972).

In the instant case, although South Coast personnel benefited from having participated in the ASL design study, we cannot conclude that those portions of the firm's proposal which duplicated material from the design study were the sole basis for its superior technical rating. On the contrary, ERDA has listed a large number of different factors which contributed to that rating. As noted above, evaluators credited South Coast with a complete understanding of the scope of work required, as shown by preliminary designs and plans for fabrication, assembly and testing, and follow-up maintenance and service. South Coast's arrangements with subcontractors and suppliers also were very highly rated. Although suspicion and distrust have been generated here, we do not believe this alone provides a basis for upsetting the proposed award to South Coast.

ERDA might have alleviated the problem of use of the ASL design study by informing all prospective offerors, either in the RFP or at the preproposal conference, that the study was complete and available under the Freedom of Information Act. This approach, however, might have made it appear that ERDA sought designs similar to ASL's for the product-improved vehicle and, in that sense, could have limited innovative approaches by other offerors.

In any case, it would be speculative for us to attempt to determine whether or how other offerors might have used the ASL design study. From our review of the technical proposals, it appears that both the successful offerors and protesters already were committed to their particular designs at the time the RFP was issued. Although they might have gained some insight into the general type of discussion and substantiation which ERDA sought, we cannot say that their designs--or resulting comparative ratings--would have been changed on the basis of the information included in the ASL study.

As one example, we note that the ASL report concluded that a front motor/front drive design was preferable "for reasons of better controllability and availability of drive system components." In the report, ASL reviewed in some detail the front and rear suspension systems of the limited number of front motor/front drive vehicles then being produced which could serve as a source of suspension components.

The vehicles described in the ASL report and offered in South Coast's proposal are not the same and the suspension components recommended for each differ in some respects. Nevertheless, both favor a front motor/front drive design and it is evident from a reading of South Coast's technical proposal that it benefited from the prior experience gained at ASL. It does not appear, however, how this discussion would have been of value of the protesters. Both National and EFPC proposed to convert front motor/rear drive vehicles, and it appears Die Mesh did as well, although that firm indicated that it would substitute two unidentified "alternate and comparable" vehicles if it experienced difficulty in obtaining the vehicle it proposed to convert.

Moreover, a DOE report submitted to our Office in connection with another protest by Die Mesh, B-190421, indicates that in March 1976, more than 90 firms were solicited for design study contracts, which subsequently were awarded to ASL, General Electric Company, and Garrett Corporation. Thus, before the protested solicitation, it was common knowledge in the electric vehicle industry that design studies were being performed, and offerors could have sought the results even if not specifically provided them by ERDA.

Finally, we do not believe that ERDA was aware or could reasonably have anticipated that South Coast was being incorporated by individuals who formerly had worked for ASL, or that these individuals would submit a proposal based in part on the ASL design study, giving rise to a duty to disclose the results of that study. There have been no allegations and no evidence on this point.

We therefore find that ERDA did not contribute to any competitive advantage gained by South Coast, and that the proposed award is not the result of preference or unfair action by the Government.

Issue No. 5: Adequacy of the Record

DOE, in its reports on the protests, furnished all parties with copies of a statement by the Source Selection Official which described evaluation of proposals. Reports of the Source Selection Panel and Technical Committee, which are considerably more detailed, have not been released to the protesters and interested parties, but have been submitted to our Office. In addition, DOE has furnished us with copies of all the proposals in contention and with additional information requested by but not released to the protesters, either because of the preaward posture of the case or because DOE considered it exempt under the Freedom of Information Act, 5 U.S.C. 552(b) (4) and (5) (1976 ed.).

Die Mesh specifically amended its protest to include requests for information which had been denied by DOE. We note that Freedom of Information Act controversies must be resolved through administrative appeals and the courts, as prescribed by the Act, rather than by our Office, which has no authority to determine what an agency

must release. McNamara-Lunz Vans and Warehouses, Inc.--
Reconsideration, B-188100, August 26, 1977, 77-2 CPD 149.

Counsel for Die Mesh also has objected strenuously to the conduct of DOE officials at the February 15, 1978, conference at our Office. Agency representatives were characterized as having "the incredible audacity to unequivocally refuse to answer" questions raised by the protest and also included in a four-page memorandum which Die Mesh presented at the conference. While DOE representatives did make some comments at the conference, they stated that "new issues" would only be discussed in written material submitted after the conference. There is some debate as to whether the issues were new or merely amplified previous grounds of protest, but, in either case, our decisions are based on the written record. A conference may be useful in fostering discussion between the parties, or in narrowing the issues, but it is not intended to be a full-scale adversary proceeding with sworn testimony and examination of witnesses. See Julie Research Laboratories, Inc., supra. In this case, DOE responded to Die Mesh's protests in two reports before the conference and in one report after the conference; Die Mesh had an opportunity to comment on each of these reports and did so. In addition, at Die Mesh's insistence, the entire conference was tape recorded and transcripts provided to all parties. We therefore believe an adequate written record on which to base a decision has been generated.

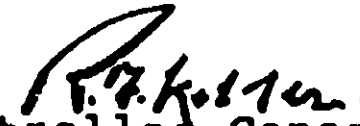
Moreover, as is our policy, we have considered and given full weight to the entire record, even though some portions of it have not been released to the protesters or interested parties. See S. J. Groves & Sons Company, B-189544, October 25, 1977, 77-2 CPD 324. We also have reviewed the report of the Inspector General, Department of Energy, covering the majority of Die Mesh's allegations. In addition, the GAO audit team previously referred to has investigated particular aspects of this procurement. The findings of these investigations to date are, we believe, in accord with our findings on the bid protests.

Conclusion .

In summary, we have found ERDA's technical evaluation, both procedurally and substantively, to be reasonable and in accord with the evaluation criteria

listed in the RFP and with the Federal Procurement Regulations. We have found that South Coast satisfied the criterion "currently engaged in the business of manufacturing electric and/or hybrid vehicles." We have found the majority of allegations of favoritism and/or conflict of interest to be without any evidentiary basis, and that the Government did not contribute to the competitive advantage, if any, of South Coast. Finally, we have found the written record upon which to make our decision adequate.

Accordingly, the protests are denied.


Acting Comptroller General
of the United States